No. 75-1001

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN J. HODAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. B 32-40) denying petitioner's motion to suppress is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1975 (Pet. App. A 30-31). The petition for a writ of certiorari was filed on January 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for a search warrant authorizing the seizure of books and records reflecting the operation of a "peep show" business in violation of state law.

2. Whether the search warrant was a "general warrant" in violation of the Fourth Amendment.

3. Whether the seizure of the books and records was an impermissible "prior restraint" under the First Amendment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of attempting to evade the corporate income tax of East Coast Cinerama Theatre, Inc., for the fiscal year ending February 28, 1969, in violation of 26 U.S.C. 7201, and of making a false statement on East Coast's income tax return for the same year, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of one year's imprisonment. The court of appeals affirmed without opinion (Pet. App. A).

The principal question presented is whether the district court correctly refused to suppress East Coast's financial records, which had been seized by the New York City police during the execution of a warrant for a search of its offices at 113 West 42nd Street, in New York City.

After an evidentiary hearing, the district court filed a written opinion, setting forth findings of fact (Pet. App. B) which may be summarized as follows: On January 27, 1972, the New York City police obtained a warrant to search premises occupied by East Coast at 210 West 42nd Street for three films which were alleged to be obscene in violation of Section 235.00 of the New York State Penal Law. The validity of this warrant is not at issue (Pet. App. B 32-33).

On the same occasion, and from the same state court judge, the police obtained a second warrant to search the offices occupied by East Coast at 113 West 42nd Street for

"books and records" of East Coast "reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law." The second warrant recited that the police had probable cause to believe that the books and records reflected "the wholesale operation of a 'peep show' business including the use of obscene movies and that said books and records will be evidence of the crime of wholesale promotion of obscene material," in violation of the New York statute.

An affidavit by a police officer in support of the first warrant (210 West 42nd) stated that he had observed at East Coast's premises at that address more than 100 peep show machines, more than 100 projectors, hundreds of reels of film (including reels of the three films named in the warrant, one of which had been held to be obscene a month earlier by another state court judge), film cutting machines, and materials and tools for assembling peep show machines.[1] The other two films were submitted with the affidavit for review by the State Court (App. 40a-41a, 80a, 163a).[2]

The affidavit by the same officer in support of the second warrant (113 West 42nd Street) repeated the statements in the first affidavit, except that it identified only one of the films (the film earlier deemed obscene by another state court judge). This affidavit also stated that persons identifying themselves as employees of East Coast had informed the officer that petitioner was the owner and sole shareholder of East Coast and that East Coast's

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[1]The police officer's observation of East Coast's operations at 210 West 42nd Street had occurred during the execution of an earlier search warrant for a bookstore which apparently shared the premises at that address with East Coast. In the district court and in the court of appeals petitioner unsuccessfully claimed that the initial search at 210 West 42nd Street was illegal and "tainted" the subsequent search of 113 West 42nd Street (Pet. App. B 34-35). Petitioner has now abandoned that contention.

[2]"App." refers to the record appendix in the court of appeals.

books and records for its peep show business were located at its offices at 113 West 42nd Street (see also App. 42a-43a).

Before issuing either warrant, the state court judge viewed two of the three films named in the first warrant but did not view the third film, which was the only film referred to in the affidavit in support of the second warrant (113 West 42nd Street). Pursuant to the second warrant, the police seized East Coast's financial records from its offices at 113 West 42nd Street. The district court refused to suppress the seized books and records prior to petitioner's trial on the income tax charges.[3]

ARGUMENT

1. Petitioner first argues (Pet. 2, 7-8, 10, 19-23) that there was insufficient evidence to establish probable cause for believing that a crime was being committed and, thus, to support the warrant for East Coast's books and records. He points out that the state judge, who issued the warrant to search East Coast's offices at 113 West 42nd Street for books and records reflecting the operation of a "peep show" business in violation of the New York obscenity statute, had not viewed the only film identified in the affidavit for the search warrant.

But the district court correctly concluded that there was no need for the state court judge to view the film specified in the affidavit and that the affidavit was sufficient to establish probable cause to believe that books and records reflecting the operation of a "peep show" business using

[3]In a separate proceeding brought by petitioner and others in federal district court against the local district attorney under 42 U.S.C. 1983, the books and records were returned to petitioner two weeks after their seizure. However, the police were apparently permitted to retain copies of the records which were returned to East Coast; these copies were turned over to the Internal Revenue Service and used at the tax prosecution because the originals, according to petitioner's testimony, had been "disposed of" (Tr. 240).

obscene movies, in violation of state law, could be found at 113 West 42nd Street (Pet. App. B 36-37). One of East Coast's employees had told the police that the books and records of the company were located at 113 West 42nd Street and that those books reflected the operation of a "peep show" business. Simultaneously with the submission of this affidavit, the other affidavit for the search of East Coast's premises at 210 West 42nd Street was presented to the same judge (Pet. App. B 33-34, 39). This other affidavit stated that, in addition to the film specified in the other affidavit, the officer had observed two other films on East Coast's premises at 210 West 42nd Street. These films were submitted to the judge for his consideration and were viewed by him prior to issuing either warrant (Pet. App. B 33).

Thus, as the district court observed (Pet. App. B 39), "[i]t is fair to conclude that * * * [the state court] relied on all the facts of which he was aware at the time" he issued the warrant for 113 West 42nd Street. Accordingly, there was ample evidence before that court from which it concluded that there was probable cause to believe that books and records reflecting that East Coast was operating a "peep show" business, in violation of state law, could be found at 113 West 42nd Street.

Moreover, many of petitioner's claims are contradicted by the facts found by the district court. For example, petitioner states (Pet. 5, 7) that the films viewed by the state court judge before issuing the warrants had been seized by the police officer without a warrant from East Coast's premises at 210 West 42nd Street. But the district court found (Pet. App. B 33) that "nothing was seized from the East Coast premises" prior to the issuance of the warrants

and that the films viewed by the state court judge were prints "that had been seized in other raids on other stores." This finding had ample support in the record. Although the police officer who conducted the initial search at 210 West 42nd Street testified on cross-examination at the suppression hearing that the films which he presented to the judge were seized by him at 210 West 42nd Street (App. 79a, 81a, 91a-92a), on redirect examination (after refreshing his recollection from his affidavit for the second warrant pertaining to 210 West 42nd Street), the officer stated that the films had been previously seized at other locations (App. 129a-141a). This testimony was corroborated by the testimony of an assistant district attorney who was present at the search (App. 172a).

2. Petitioner further contends (Pet. 2, 11, 15, 23) that the state court was limited to consideration of the single affidavit in support of the search of 113 West 42nd Street. But both search warrants were directed at investigating the same criminal enterprise which operated at two different locations. The affidavits were submitted simultaneously to the same judge (App. 38a) and who issued both warrants on the same day (App. 162a-163a). Under these circumstances, there is no reason to believe that the facts set forth in the first affidavit did not form a basis for the issuance of the second warrant.

The Fourth Amendment only requires that probable cause for the issuance of a warrant be "supported by oath or affirmation." A state court may resort to evidence other than that in the supporting affidavit in making a probable cause determination. *Campbell* v. *State of Minnesota*, 487 F.2d 1, 4-5 (C.A. 8); *United States ex rel. Gaugler* v. *Brierley*, 477 F.2d 516, 520 (C.A. 3); *Boyer* v. *State of Arizona*, 455 F.2d 804, 806 (C.A. 9); *Radcliff* v. *Cardwell*, 446 F.2d 1141, 1143 (C.A. 6); *United States ex rel. Pugach* v.

Mancusi, 411 F.2d 177, 180 (C.A. 2). Here, where all of the evidence supporting the warrant was in affidavit form, the standards of the Fourth Amendment were met.[4]

3. Petitioner further contends (Pet. 2, 12-15, 24-29) that the warrant was a constitutionally impermissible "general warrant" and the seizure of East Coast's financial records under the authority of the warrant constituted a "prior restraint" forbidden by the First Amendment (Pet. 2-3, 9-10, 17-18). Petitioner relies upon *Stanford* v. *Texas*, 379 U.S. 476; *Near* v. *Minnesota*, 283 U.S. 697; and *Roaden* v. *Kentucky*, 413 U.S. 496. Those cases, however, involved seizure of materials which were protected by the values of free expression fostered by the First Amendment, and do not affect the validity of the seizure of financial books and records.

While this Court held in *Stanford* v. *Texas*, *supra*, 379 U.S. at 485, that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain," it distinguished those items from the financial books and records of an unlawful enterprise. Thus, the Court specifically noted that (*id.* at 485 n. 16):

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case.

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[4]The cases relied upon by petitioner (Pet. 23) are distinguishable. They hold only that information known to the police officer but not disclosed to the magistrate may not be subsequently considered in determining whether probable cause existed for a warrant.

Since the warrant was directed only to financial books and records, and not books for the ideas which they contain, its description of the things to be seized as "books and records of East Coast Cinematics, Inc., reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law" was sufficient under the Fourth Amendment and did not constitute a "general warrant." See *Marron* v. *United States*, 275 U.S. 192, 198-199.[5]

Contrary to petitioner's final argument (Pet. 7-13), there was no "prior restraint" in this case in violation of the First Amendment. Unlike its films, East Coast's financial books and records were not used for public exhibition. But even assuming *arguendo* that the books and records could be equated to material protected by the First Amendment, petitioner has made no showing, either here or in the courts below, that the temporary seizure of East Coast's financial records brought, or was likely to bring, "to an abrupt halt an orderly and presumptively legitimate distribution or exhibition" (*Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504) of films in East Coast's "peep show" machines.

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[5]Petitioner does not argue that the seizure of the books and records violated the Fifth Amendment privilege against compulsory self-incrimination, and there is no showing that he claimed that privilege. The books and records in question here are corporate books and records to which the Fifth Amendment privilege does not apply. See *Bellis* v. *United States*, 417 U.S. 85, 89. Hence, the question presented in *Andresen* v. *Maryland*, No. 75-1646, argued February 25, 1976, as to whether the Fifth Amendment bars the seizure of an individual's books and records pursuant to a search warrant is not involved here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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